84-1331

Office-Supreme Court, U.S.
FILED
FEB 20 1985
ALEXANDER L. STEVAS,
CLERK

No. _____

In the Supreme Court of the United States

October Term, 1984

JOSEPH J. RODGERS,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the government can try an individual, together with other individuals and entities, when its evidence against the individual is vastly disproportionate to the others; or whether the government should be required to demonstrate it has a certain minimum amount of evidence against the individual before it can try him with the others?

II. Whether the Court should be required to marshal the evidence on behalf of an individual when the evidence against that individual is vastly disproportionate to the evidence against co-defendants?

LIST OF ALL PARTIES

There were six parties to this case in the Third Circuit Court of Appeals that are not listed in the caption of this petition:

1. Fischbach and Moore, Inc.
2. Lord Electric Co., Inc.
3. Sargent Electric Co.
4. Paul E. Arbogast
5. Frederic B. Sargent
6. Ralph D. Vryenhoek

JOINDER OF PETITIONS FOR A WRIT OF CERTIORARI ARISING FROM THE SAME JUDGMENT

Pursuant to Rule 19.4 of the Rules of the Supreme Court of the United States, petitioner Joseph J. Rodgers hereby joins in the petitions for writ of certiorari submitted by Fischbach and Moore, Inc., Lord Electric Co., Inc., Sargent Electric Co., Paul E. Arbogast, Frederic B. Sargent and Ralph D. Vryenhoek.

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In the
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No.

JOSEPH J. RODGERS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Joseph J. Rodgers respectfully asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered on December 10, 1984.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals, not yet officially reported, is annexed as Appendix A. The bench opinion of the District Court denying Rodgers' motion for judgment of acquittal at the close of plaintiff's case is annexed as Appendix B. The bench opinion of the District Court denying Rodgers' motion for judgment of acquittal and motion for new trial after discharge of the jury is annexed as Appendix C. The judgment of the Court of Appeals is annexed as Appendix D. The order of the Court of Appeals staying the Court's mandate is annexed as Appendix G.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals was entered on December 10, 1984 (Appendix D). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

Petitioner was sentenced pursuant to Section 1 of the Sherman Act, 15 U.S.C. §1, which provides, in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . .

STATEMENT OF THE CASE

1. Procedural History

The indictment in this antitrust case was filed on July 1, 1983 and consisted of one count, charging 11 defendants with violating 15 U.S.C. §1 by fixing prices, rigging bids and thereby allocating projects let out to bid by the United States Steel Corporation and its Western Pennsylvania Works.

All defendants pleaded not guilty to the indictment on July 15, 1983. However, two defendants subsequently changed their pleas to guilty pursuant to plea agreements negotiated with the government.

The trial of all other defendants commenced on February 6, 1984. At the close of the government's case in

chief, all defendants moved for judgment of acquittal. The motions of Tri-City Electric Company, Inc. and James L. Oesterle were granted. The motions submitted by the other defendants were denied peremptorily; however, appellant Rodgers' motion was taken under advisement by the Court, which denied the motion the next day (Appendix B).

The trial of the remaining defendants continued. Testimony ended on March 2, 1984. Motions for judgment of acquittal were then renewed and again denied. The jury returned a verdict of guilty against all remaining defendants on March 7, 1984. All appellants again moved for judgment of acquittal, or in the alternative for new trials, and again the motions were denied, the court nevertheless acknowledging that the argument on behalf of Rodgers deserved greater attention. (Appendix C).

All defendants subsequently filed appeals to the United States Court of Appeals for the Third Circuit. Following oral argument on October 3, 1984 before Judges Aldisert, Hunter and Weis, the Court affirmed the judgment of the District Court in all respects.

On December 21, 1984, Rodgers filed a Petition for Rehearing pursuant to F.R.A.P. 40(a), which was denied January 14, 1985. (Appendix F). On January 30, 1985, the Court of Appeals stayed its mandate until February 20, 1985, pursuant to F.R.A.P. Rule 41(b). (Appendix G).

2. Statement of Facts Relevant to Petitioner Rodgers

The single conspiracy charged in the indictment is a continuing conspiracy. Its scope stretches over a possible seven year period and embraces every single job let out for bidding by U.S. Steel at its Western Pennsylvania Works during the relevant time frame.

Throughout this period, the practice of U.S. Steel was to solicit bids for each electrical construction project from a group of three to six contractors. Certain contractors appeared regularly on the bidders list throughout the entire seven year conspiracy period; these were Fischbach & Moore, Inc., Lord Electric Company, Inc. and Sargent Electric Company. Up until 1978, E. C. Ernest, Inc. also appeared regularly on the lists but, at that time, Ernst encountered financial difficulties and disappeared from the lists. Thereafter, Meade Electric Company appeared more frequently on the lists than it had before.

Other contractors, of course, also appeared on the lists but far less frequently than those mentioned above. These included Tico Electric, Inc., Fuellgraf Electric Company, Broadway Electric Company, L. K. Comstock & Company, Inc., Tri-City Electric Company, Ferry Electric and Rost Electric.

The company for whom Joseph Rodgers worked as a branch manager, The Howard P. Foley Company, also appeared on the bidders list during the relevant period—twice. The first time was on December 19, 1979, for a project to U.S. Steel's Clairton Works, which was ultimately awarded to another company for $557,487. About a month later, on January 18, 1980, Foley was on the bidders list again for a project, also at U.S. Steel's Clairton Works, which was awarded to another company for $597,500. The other bidders on both jobs were Fischbach & Moore, Sargent, Lord and Meade.

The Howard P. Foley Company had not appeared on the U.S. Steel bidders list prior to December 19, 1979 since the late 1960's.

Testimony indicated that, throughout the conspiracy period, numerous bids were rigged by a variety of electrical contractors, most prominently, of course, those who appeared most frequently on the bidders lists—Fischbach & Moore, Sargent, Lord, and first E. C. Ernst and later Meade. However, Richard Perrott, Lord Electric's chief estimator throughout the conspiracy period, and a government witness, indicated that he had also rigged bids with all of the other companies mentioned above, with the exception of Rost and Ferry. With regards to Tri-City, he testified that sometimes he could "work out" projects with them and sometimes he could not. With regards to the Howard P. Foley Company—the company that appeared on a bidders list exactly two times during the course of the conspiracy—he testified similarly, sometimes he could work it out with them and sometimes he could not.

Henry Therrien, of Meade Electric, testified that he referred to those rigging bids as "the committee." The members of "the committee" in his mind were "the people who were at most of the meetings," obviously, the people who appeared most frequently on the bidders list. Therrien never considered Joe Rodgers a member of "the committee."

Between 1974 and 1981, "the committee", and others from time to time, met together or spoke by telephone prior to bidding U. S. Steel jobs in order to determine who would submit the low bid. Lists of rigged bids were kept so that jobs could be allocated fairly among the contractors. Government witness Henry Therrien testified that the conspirators had regular bid rigging meetings at the Duquesne Club in Pittsburgh. Government witness Perrott testified that he attended as many as 15 such meetings per year during the course of his involvement in the conspiracy.

The evidence offered against all the defendants, except Rodgers, indicated their regular attendance at these meetings, and further, their regular participation in the general activities of the conspiracy. However, the evidence against the petitioner Rodgers was radically different from the evidence offered against the others at trial. At a 1979 meeting described as "unique" by government witnesses, Rodgers appeared at a Duquesne Club meeting and angrily complained about being "locked out" of U. S. Steel work. Government witness Therrien, whose account of this meeting parallels that of government witness Perrott, said that Rodgers "mentioned the fact that he had cooperated with other people at the meeting and he felt he should be given some consideration." Therrien indicated that as a result of Rodgers' angry statements at the Duquesne Club, the committee decided to give Rodgers consideration "for a job he was asking for." Even though the H. P. Foley Company submitted the low bid on the job, U. S. Steel refused to grant them the contract.

After this meeting, and the phone call Rodgers made to the other participants as a result of that meeting, no witness reports hearing from Rodgers again telephonically. Nor does anyone testify that he called Rodgers.

In contrast to the virtual unanimity of the testimony related to this initial project is the sharp conflict in the testimony related to the second and final project for which Foley appeared on the bidders list.

After testifying that, throughout the conspiracy period, sometimes he could work with Foley and sometimes he could not, and that he could only remember attending a single meeting with Rodgers, Richard Perrott further testified that he thought the bids for this second project were rigged, and that they were rigged at a

Duquesne Club meeting which Rodgers attended. He gave no testimony indicating anything beyond mere presence at the meeting.

While Therrien also testified that this job was rigged, he said that it was rigged over the phone, not at a Duquesne Club meeting. He testified that Paul Arbogast of Lord Electric called him. He said, "Mr. Arbogast asked me to give consideration on the contract, and I told him okay." As for the other bidders, Arbogast said "he was calling the bidders and expected to get okay's, but if he did, I have no knowledge."

Paul Arbogast testified that prior to and after the meeting described above, which Rodgers definitely attended, he never discussed a U.S. Steel bid with Rodgers.

Although the evidence clearly establishes that on one occasion, Rodgers angrily demanded a job for the Foley Company, the prosecution presented no evidence that he ever allocated or agreed to allocate a job to any other member of the conspiracy. Nevertheless, in his bench opinion denying Mr. Rodgers' post-trial Motion for Judgment of Acquittal at Appendix C, pp. 33a-37a, Judge Cohill held that attendance at the one Duquesne Club meeting was sufficient evidence of Rodgers' membership in the continuing conspiracy charged in the indictment.

Additionally, during the course of the trial Judge Cohill told counsel that he would not charge the jury as to individual defendants. Although the small amount of evidence against Rodgers consumed only a tiny fraction of the month of trial time, and although his counsel raised numerous arguments concerning prejudicial spillover of evidence, the trial court failed in its jury instructions to marshal the evidence as to Mr. Rodgers.

REASONS FOR GRANTING THE WRIT

Courts, including this one, have long voiced concern for the potential for abuse inherent in conspiracy trials. Just such abuse spawned the decision in *Kotteakos v. United States*, 328 U.S. 750 (1946), and in other cases which today help shape the contours of conspiracy law.

Nonetheless, federal prosecutors still seek conspiracy indictments in an alarmingly high percentage of their cases, even when indictments could have been obtained for the underlying substantive offenses. *Conspiracy: The Criminal Agreement In Theory And In Practice*, 65 Geo. L.J. 925, 946-948 (1977). Conspiracy is charged so often, obviously, because it arms the prosecutor with certain advantages he might not otherwise enjoy, and the advantages are not necessarily all evidentiary. Paul Marcus, in his research among prosecutors, defense attorneys, law school professors and judges, found that 25.9% of them believed that one of the advantages for the prosecution in conspiracy trials is the confusion they engender in the jury. The admonishment of Judge Jerome Frank, dissenting in *United States v. Liss*, 137 F.2d 995, 1003 (2nd Cir. 1943), is clearly as pertinent today as it was then:

> "We judges ought to take judicial notice of what every ordinary person knows about juries, and therefore to recognize that the 12 citizens, casually summoned to serve as jurors, are not trained fact-finders and can be easily bewildered .... The need for safeguarding defendants from misunderstanding by the jury is peculiarly acute in conspiracy trials...."

Because the danger of conviction based on confusion rather than facts is so high in conspiracy trials, there should be some irreducible quantum of evidence that the government should be required to have before it is allowed

to ensnare an individual within a large and time-consuming case, particularly when the evidence against all but the individual is so overwhelming.

Furthermore, a single defendant, standing trial with others against whom the evidence is so far superior, both in terms of quantity and quality, needs, and indeed deserves, some special protection from the court. One form of protection should be the marshalling of the evidence against that single defendant in the court's charge to the jury.

This issue, the second question posed by this petition, was raised before the Court of Appeals but the Court failed to address it.

A. The Government Should Not Be Able to Try an Individual for Participation in a Long-Running, Highly-Organized and Successful Conspiracy Without a Certain Irreducible Minimum Amount of Evidence.

Surrounded by almost four weeks of testimony concerning the participation of his co-defendants in a seven-year continuing conspiracy to rig bids and thereby allocate as many jobs at U. S. Steel's Western Pennsylvania Works as possible was no more than one hour of testimony relating to possible bid rigging activities on the part of Joseph Rodgers.

Thus, it may be fairly said that the government presented evidence of only one unequivocal act in almost four weeks of testimony about a seven-year conspiracy to rig every job possible let out for bidding by U. S. Steel at its Western Pennsylvania Works during the relevant time frame.

Indeed, the testimony suggesting Rodgers' presence at a second meeting was so inconsistent and unreliable that Judge Cohill relied solely upon evidence of the one meeting in ruling upon Rodgers' post-trial motion for judgment of acquittal. (See Appendix C, pp. 33a-37a).

The jobs were rigged either over the phone or at meetings of the conspirators at a private club in Pittsburgh. As many as 15 meetings were held a year. The volume of evidence involved in the case is evident. And its volume was compounded by its uniformity, at least as to everyone but Rodgers.

Not unexpectedly, given the scope of the alleged conspiracy both in terms of time, and in terms of the number of jobs subject to discussion amongst the conspirators, the government's various witnesses found it difficult to remember what particular people said at particular meetings. In fact, more seriously, they found it difficult to remember particular jobs, and Richard Perrott, at least, confessed to assuming jobs were rigged simply by looking at the list of bidders, without any independent recollection of the job or the process of rigging.

This may not be fatal in the cases of the other defendants. They were all companies and individuals whom witnesses testified appeared at meetings regularly, who spoke to each other on the phone regularly, and who were the beneficiaries of numerous jobs at U. S. Steel. The government's witnesses assumed that a defendant, like Paul Arbogast, for example, was at a particular meeting at the Duquesne Club because Arbogast was almost always at the meetings.

But such assumptions about Joseph Rodgers regarding participation at a meeting or in the allocation and rigging

of a job should carry no weight. Nonetheless, it is precisely such assumptions which are so helpful to the Government in these kinds of cases, and which are so obviously the advantage of multi-party conspiracy trials. In order to take advantage of such assumptions, the Government should be required to possess more evidence against an individual than it possessed against Rodgers in this case. The evidence should indicate some commonality of activity, and should have some reasonable degree of proportionality to the evidence against the other defendants.

In such a case as this—involving numerous individuals and acts and years—the single act so unequivocal, so clear and so convincing as to be sufficient to bind an individual to the conspiratorial juggernaut must indeed be rare. For in such a case as this, the single act is asked to bear such a weighty load of inferences. From the single act we are to infer "deliberate, knowing and specific intent to join the conspiracy." *United States v. Prince*, 515 F.2d 564, 567 (5th Cir. 1975).

In *United States v. Continental Group, Inc.*, 603 F.2d 444 (1979), the Third Circuit recognized the danger of allowing a single act to support too heavy an inference, and suggested the need for close scrutiny of cases which purport to prove participation in a long-running conspiracy with a single act. In *Continental Group*, the government charged a 26-year conspiracy to fix the price of consumer bags. Evidence was presented of numerous meetings attended by manufacturers of bags, of phone calls between manufacturers for the purpose of exchanging price information, and of obviously parallel pricing practices.

One manufacturer, Chase Bag, argued that the government had proven as to it only that it had agreed to follow the price set by another manufacturer in 1974 for pet food

bags. The Third Circuit agreed that, had this been the only evidence against Chase Bag, the government's proof would have fallen below that irreducible minimum. *Id.* at 455. One agreement—even when it is an obviously illegal agreement—is not enough to make one a member of a 26-year conspiracy.

However, the Court did not find the evidence so sparse. Chase Bag had additionally participated in numerous other meetings where prices were discussed. It had exchanged price information with its competitors and, it too, had engaged in parallel pricing.

Significantly, the Third Circuit did *not* conclude from this additional evidence that the narrow agreement as to pet food bags was thereby transformed into the grandiose, 26-year continuing conspiracy of the indictment. Rather, it concluded that the additional evidence took on wider implications because of the evidence of the single agreement.

In this case, too, there was direct evidence of a limited agreement between the petitioner Rodgers and others. But in this case, there were no other conspiratorial activities for the evidence of Rodgers' single agreement to illumine. Nothing was explained by Rodgers' single act because there was nothing else to explain.

In *U. S. v. Borelli*, 336 F.2d 376 (2nd Cir. 1964), Judge Friendly confronted evidence of a nine-year conspiracy to acquire and distribute both cocaine and heroin. Like the conspiracy in this case, a small group of individuals played key roles throughout the entire nine-year period, while other minor characters entered and exited within a shorter time frame. Judge Friendly labeled the position that "if the evidence warrants the finding that some defendants were

parties to a single agreement . . . for a nine-year period, it necessarily does so as to every defendant who has conspired with them at any time for any purpose" "a considerable over-simplification." *Id.* at 384.

Yet it is the kind of oversimplification that a jury might indulge in, especially when confronted with four weeks of testimony, evidence covering a seven-year time span and perhaps as many as 70 to 100 meetings attended by a half dozen different individuals. Allowing the government to take advantage of that volume and weight of evidence to cloak a single individual, with the thinnest of ties to the conspiracy, in guilt, is to arm it with a weapon it should not be able to wield.

It is the facts, and the inferences to be drawn therefrom, which the government must rely on, rather than confusion and a thin cloak of guilt borrowed from others.

At every critical juncture in this case, it has been acknowledged that the presence of the bit player Rodgers in the midst of the extravagence which was this case raised serious problems. The Third Circuit commented frankly that Rodgers' case was a close one.

Petitioner respectfully suggests it would not have been so close stripped of the supporting structure provided by the case against his co-defendants. Trying indivduals together against whom a certain amount of evidence is shared makes sense. But trying an individual together with others with only minimal evidence in common makes for mistakes. These mistakes are far and away more likely to benefit the Government than the defendant. At some point the evidence against the individual is so far disproportionate to the evidence against the others that the conviction of

the individual is more likely to have resulted from a mistake than a careful weighing of the evidence. Such a case is this one.

B. When An Individual Stands Trial With Others Against Whom the Evidence is Vastly Superior, That Individual Should Be Provided with the Special Protection Provided by a Charge to the Jury In Which the Court Marshals the Evidence.

It is clear that in terms of both quality and quantity, the evidence against Rodgers was a needle in the haystack of the evidence against the other defendants. Under *United States v. Kelly*, 349 F.2d 720 (2nd Cir. 1965), *cert. denied*, 384 U.S. 947 (1966), reversible error is committed when a trial judge in his charge to the jury, fails to marshal the evidence relating to a particular defendant, where the evidence against that defendant is not as substantial as the evidence against the other defendants. Under *Kelly*, the trial court should assist the jury through cautionary instructions, in its task of distinguishing the evidence offered against individual defendants. *United States v. Bless*, 422 F.2d 210, 213 (2nd Cir. 1970); *United States v. Garrison*, 348 F. Supp. 1112, 1124 (E.D. La. 1972). The *Kelly* safeguard should be made available to prevent "substantial spillover" of evidence from one defendant to another. *United States v. Hubbard*, 474 F. Supp. 64, 88 (D.C. D.C. 1979).

The evidence against Rodgers' co-defendants did not merely "spill over" into the case against him; it flooded it.

The prejudice caused by the Court's failure to marshal the evidence is aggravated by the opportunity for misinterpretation by the jury of its conspiracy charge. The Court's conspiracy charge may not have been obviously wrong in

any respect, but it lacked the precision necessary to protect Joseph Rodgers from the natural confusion which would arise in any layperson's mind when trying to differentiate between joining a continuing conspiracy for a short period of time and joining a short-lived conspiracy.

Where the evidence at trial against one defendant is not as strong as the evidence against his co-defendants, "it is especially important that the defendant be granted every safeguard." *United States v. Mardian*, 546 F.2d 973, 980 (D.C. Cir. 1976). In *Glasser v. United States*, 315 U.S. 60, 67 (1942), a similar principle was recognized by the United States Supreme Court:

> "In all cases the constitutional safeguards are to be preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt."

Although marshaling the evidence may be out of favor in today's courtroom, it is an exercise which offers considerable protection to the individual being tried as part of the group. When that evidence against one defendant is vastly disproportionate to the evidence against his co-defendants, as it was in this case, marshalling of the evidence should be a required protection.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the order of the United States Court of Appeals of the Third Circuit dated December 10, 1984.

Respectfully submitted,

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APPENDIX A

ORDER OF THE COURT OF APPEALS
[Officially Unreported]

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 84-3242, 84-3243, 84-3244,
84-3253, 84-3266, 84-4367 and 84-3268

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E. C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Appellant in No. 84-3266

JOSEPH J. RODGERS

(D.C. Crim No. 83-0098-07)

Appeal from the United States District Court for the Western District of Pennsylvania—Pittsburgh

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Argued October 3, 1984
Before: ALDISERT, *Chief Judge,*
HUNTER and WEIS, *Circuit Judges*
(Filed December 10, 1984)

OPINION OF THE COURT

ALDISERT, *Chief Judge.*

Three principal issues are presented in this appeal from sentences imposed on a guilty verdict in a criminal anti-trust prosecution: whether the proof at trial varied from the indictment charging a single, continuing conspiracy; whether the government introduced sufficient evidence to prove the interstate commerce element of the Sherman Act violation; and whether this court should set aside or modify, on appeal, the one million dollar fine levied against defendant Fischbach & Moore. Appellants assert several less significant arguments, including the admission of an allegedly prejudicial government exhibit; prosecutorial misconduct during closing argument; errors in jury instructions; and the denial of a continuance to defendant Arbogast. Because we find no reversible error, we affirm the judgment of the district court.

I.

For approximately seven years, from 1974 to 1981, representatives of several electrical contracting companies met at the Duquesne Club in Pittsburgh. The purpose of these meetings was to allocate electrical construction projects, by bid rigging, at the Western Pennsylvania Works (Works) of United States Steel (USS). Whenever one of the companies desired to rig a bid, that company's representative would telephone the other contractors and arrange a meeting. After deciding among themselves which firm would receive the contract, that firm's representative would contact the other contractors and would tell them what bid to submit, ensuring that his firm's bid would be the lowest. Some of the firms kept track of the allocations

to ensure that each contracting company received its fair share of work.

As a result of investigating this bid rigging scheme, the government accused a number of the electrical contractors and their employees of antitrust violations. The indictment charged them with violating §1 of the Sherman Act by conspiring to allocate electrical construction projects at the Western Pennsylvania Works, to fix the prices at which those projects were bid, and to submit noncompetitive, collusive, and rigged bids on those projects. Although some of the defendants plea bargained to the charges and avoided trial, three electrical contracting companies, Fischbach and Moore (F&M), Sargent Electric and Lord Electric, and four individual employees, Paul Arbogast, Joseph Rodgers, Frederic Sargent, and Ralph Vryenhoek, stood trial on the charges. They are the appellants before us.

Prior to trial, one of the defendants, Paul Arbogast, was indicted and prosecuted in Montana for an unrelated Sherman Act violation. The district court postponed the Western Pennsylvania trial once because of the Montana action. In mid-January 1984, Arbogast again moved for a continuance, the Montana trial not having ended and the Western Pennsylvania trial scheduled to begin in early February. The court denied this motion. Arbogast was acquitted in Montana on January 21 and began trial in Pittsburgh on February 6.

To narrow the scope of the trial, the government issued a bill of particulars, which it later amended, identifying contracts within the scope of the conspiracy. The proof at trial related to some, but not all, of the contracts

on this list. The government also introduced extensive evidence to prove the interstate commerce jurisdictional element. This evidence included Government Exhibit 32 (Govt. Ex. 32), a file of invoices and freight bills for electrical materials and equipment brought by USS from out-of-state vendors for use in electrical construction projects at the WPW.

After a finding of guilty by the jury, the district court imposed both fines and prison sentences on the individual defendants. The three corporate defendants received fines of one million dollars each, the statutory maximum under §1 of the Sherman Act. Defendants now appeal their convictions, and have asserted a long list of contentions, requiring this opinion to be more lengthy that what we believe to be appropriate in this court.

II.

Appellants raise three principal contentions. First, appellants F&M, Lord Electric, Sargent Electric, Paul Arbogast, and Joseph Rodgers allege a variance between the proof and the indictment. In a related argument, F&M, Lord Electric, Ralph Vryenhoek, and Frederic Sargent allege that the government did not prove the interstate commerce element of the Sherman Act charge. In the third major contention, F&M alleges both that its sentence was illegal and that the trial court abused its discretion in imposing sentence.

The precepts guiding our review of the variance argument are familiar. Our polestar is to determine whether "there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision." *United States v. Palmeri*, 630 F.2d 192, 203 (3d Cir. 1980) (quoting *Burks v. United States*, 437 U.S. 1, 17

(1978)), *cert. denied*, 450 U.S. 967 (1981). Additionally, *Kotteakos v. United States*, 328 U.S. 750 (1946), sets forth the two-pronged test appellants must meet to succeed in this specific contention: (1) that there was a variance between the indictment and the proof and (2) that the variance prejudiced some substantial right of the defendants. *Id.* at 752, 756.

In the usual criminal case, our review of a sentence imposed by the district court is extremely circumscribed. *United States v. Felder*, 706 F.2d 135, 137 (3d Cir. 1983).[1] Generally, if the sentence falls within the statutory maximum, the matter is not reviewable on appeal. *United States v. Dickens*, 695 F.2d 765, 782 n. 26 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 1792 (1983). We may review the sentence, however, if there is a showing of illegality or abuse of discretion. *United States v. Fessler*, 453 F.2d 953, 954 (3d Cir. 1972). We now consider appellants' variance argument.

III.

Appellants F&M, Sargent Electric and Paul Arbogast argue that because the government's evidence sought to establish multiple conspiracies and not the single, continuing conspiracy charged in the indictment, the convictions must fall as illegal. They allege variance in two respects: (1) that the government interpreted the indictment to charge that *all* electrical contracting bids were rigged during the time of the conspiracy, later reducing the number of bids in the bill of particulars and further reducing them

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[1] *But see* Sentencing Reform Act of 1984, Pub. L. No. 98-473, §213(a), 98 Stat. 1837, (1984) (to be codified at 18 U.S.C. §3742(a)) (effective Nov. 1, 1986) (will allow review of sentences under limited circumstances after Act's effective date).

at trial and (2) that the government proved not one continuing conspiracy, but a series of independent conspiracies, *i.e.*, that each contract the government proved the defendants rigged constituted a separate conspiracy.

A.

The indictment charged that the defendants conspired to "allocate among themselves electrical construction projects" at the Works; to "fix the prices at which electrical construction projects" were bid; and to "submit noncompetitive, collusive, complementary and rigged bids." App. at 21a-22a. But the indictment did not state the the conspiracy encompassed all bids or all contracts made during the seven-year period. Although the government so stated at a pre-trial conference, even if the appellants relied on these government representations or the bill of particulars as to the extent of proof, neither can modify the scope of the indictment. *United States v. Critchley*, 353 F.2d 358, 362 (3d Cir. 1965) (bill of particulars).

Even had the indictment read in terms of "all construction projects" and "all bids," the government still would have introduced sufficient evidence to prove the crimes charged. To prove a conspiracy to rig all bids, the government was not required to show that the defendants actually rigged all bids. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940). The defendants could have conspired to rig all bids, but failed to achieve that objective for one reason or another, e.g. because the bid lists included companies with which the defendants could not cooperate. Evidence of the fourteen rigged bids both proved that a conspiracy to rig bids existed and permitted the jury to conclude that the conspiracy encompassed all bids.

B.

We also conclude that the government introduced sufficient evidence to justify a jury finding of only a single conspiracy. The government proved that the defendants met, over a period of several years, at the Duquesne Club for the sole purpose of rigging bids and allocating contracts. The government introduced evidence to prove that all the participants knew the purpose of the club meetings and that they met as a group, thus negating the argument that separate groups of the defendants were conspiring together, with the same goal, but with their actions unconnected. More important, the government showed that some of the defendants kept records of which company received which job, ensuring that each firm would receive its fair allotment of the contracts. This recordkeeping indicated a single conspiracy that continued over time, and not separate conspiracies involving only certain contracts.

Because we hold that defendants did not prove a variance between the proof and the indictment, we need not consider the prejudice prong of *Kotteakos*.

C.

In a related argument, appellant Lord Electric maintains that the proof varied from the indictment in that the government proved one conspiracy, but that conspiracy had no effect on interstate commerce. As support for this contention, Lord Electric expressly declines to rely on *Kotteakos*, conceding that it suffered no prejudice from the variance alleged. Instead, Lord Electric relies on the language of the Sherman Act requiring the conspiracy to restrain "trade or commerce among the several States." 15 U.S.C. §1.

As we understand this argument, Lord Electric contends that the government proved a single agreement to rig bids only at the time one of the defendants would telephone the others to arrange a meeting. This agreement, appellant states, was harmless and restrained no trade. Rather, the ensuing agreements reached at the meetings restrained trade, but those fourteen separate agreements were not charged in the indictment. We decline to adopt this convoluted construction of the offense charged in the indictment.

Lord Electric's argument starts to collapse when it concedes, as it does, that it conspired to fix bids when one of the other conspirators made a telephone call. Because we cannot isolate the original telephone call with the subsequent action triggered by the call, the keystone of this argument falls out. These telephone calls and the meetings that followed were an integral part of the conspiracy to fix bids, to which appellant agreed. To view the conspiracy in terms of artificial separate and distinct phases would give no meaning to the agreement into which Lord Electric entered and for which it was indicted. Had the defendants not contemplated making the telephone calls, no reason existed for them to agree to rig bids if the calls were made. Rather, the calls and Duquesne Club meetings constituted concerted activity to further the conspiracy to rig bids. As such, anticompetitive effects of these actions cannot be separated from the initial agreement to rig bids.

IV.

In a more particularized argument, defendant Rodgers contends that the government did not introduce evidence sufficient for the jury to find that he knowingly joined the continuing conspiracy charged in the indictment. He

argues that he began to attend the Duquesne Club meetings only as a casual observer to protect the interest of his company Foley Electric and that his appearance was long after the other defendants entered into a conspiracy. To join a conspiracy, the government generally must prove two different types of intent: (1) the basic intent to agree, which is necessary to establish the existence of the conspiracy and (2) the more traditional intent to effectuate the object of the conspiracy. *United States v. United States Gypsum Co.*, 438 U.S. 422, 443 n.20 (1978).

In a situation very similar to that of Rodgers, in *United States v. Continental Group, Inc.*, 603 F.2d 444 (3d Cir. 1979), defendants were convicted of a 26-year continuing conspiracy to fix the price of consumer bags. One defendant, Chase Bag, maintained that the government had introduced insufficient evidence to support its conviction, arguing that its behavior was legitimate price followership. *Id.* at 448. We affirmed Chase Bag's conviction, basing our decision on, among other things, Chase Bag's adoption of an unpublished price list of a competitor, St. Regis. We stated:

> Had the St. Regis incident been the only evidence against Chase Bag, we might agree that the government's proof varied substantially from the indictment. We note, however, that Chase Bag's participation in various meetings where prices were discussed, its exchange of price information with competitors, and its parallel pricing policies, although perhaps innocent by themselves, are cast in a different light by [Chase Bag's] apparent agreement with [St. Regis] to fix prices.

Id. at 455.

Although the issue is close, we are persuaded that the government introduced sufficient evidence to demonstrate that Rodgers knowingly entered the continuing conspiracy. Although he joined the Duquesne Club meetings at a point far into the conspiracy, his purpose in going there was to obtain contracts (specifically the contract designated as Govt. Ex. 23) for his company, Foley Electric. After it was agreed that Foley was to be the low bidder on this contract, Rodgers arranged the bid submissions on this contract by telephoning the other companies and telling them what prices to bid. The most damning evidence against Rodgers was his alleged reason for wanting this particular contract: "because he had cooperated with other people at the meeting and he felt that he should be given some consideration." App. at 1826a-27a. Viewed in the light most favorable to the government, this remark evidences Rodgers's knowledge both of the continuing nature and goals of the conspiracy and his intent to join the conspiracy and further its objectives. Rodgers's actions only confirm his understanding of and familiarity with the conspiracy.

If the testimony pertaining to Govt. Ex. 23 was the only evidence on which the government relied, perhaps Rodgers would have had a stronger case. See, e.g. the one-time only exception we suggested in *Continental Group*, 603 F.2d at 455. But here the government introduced evidence of Rodgers's involvement with another rigged contract, designated as Govt. Ex. 27. Although testimony was conflicting as to whether the contract was rigged over the phone or at a club meeting, viewed in the light most favorable to the government, the jury could have found that Rodgers also participated in rigging this contract. We therefore concluded that substantial evidence existed to tie Rodgers to the conspiracy.

We now turn to appellants' interstate commerce argument.

V.

Appellants F&M, Lord Electric, Ralph Vryenhoek, and Frederic Sargent argue that the government did not prove the interstate commerce element of the Sherman Act charge.

Section 1 of the Sherman Act proscribes "every contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States . . . ." 15 U.S.C. §1. The government may prove the connection of the restraint to interstate commerce under either of two independent theories. *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 242 (1980). An "in commerce" theory requires that the government prove that (1) a substantial volume of interstate commerce is involved with the challenged activity and (2) the challenged activity is an essential, integral part of the transaction and is inseparable from its interstate aspects. *Id.* at 244. An "effect on commerce" theory, applies to primary intrastate activity. The government must show that (1) a substantial amount of interstate commerce was involved and (2) the challenged activity has a "no insubstantial effect" on interstate commerce. *Id.* at 245-46; *see also Cardio-Medical Association, Ltd. v. Crozer-Chester Medical Center*, 721 F.2d 68 (3d Cir. 1983).

The government may prove the nexus between interstate commerce and the challenged activity through either the activities of the target of the antitrust violation or defendant's activities. *Id.* at 74. Because the activities involved in this case, price-fixing and bid rigging, are *per se* violations, *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958) (price fixing); *United States v.*

Grighton Building & Maintenance Co., 598 F.2d 1101, 1106 (7th Cir.), *cert. denied*, 444 U.S. 840 (1979) (bid rigging); *United States v. Flom*, 558 F.2d 1179, 1183 (5th Cir. 1977) (bid rigging), the government is not required to prove any adverse impact on interstate commerce. *Northern Pacific*, 356 U.S. at 5.

Based on the trial testimony, we hold that the government introduced substantial evidence to support a jury finding that either the electrical contracting services were in commerce or that the defendants' activities affected interstate commerce. As to the in commerce theory, the government introduced evidence to show that the contractors and USS ordered substantial amounts of materials from out of state for use on the USS jobs. Not only pieces of equipment used in the Works jobs cost tens of thousands of dollars, but often showed that materials were shipped directly from out-of-state manufacturers to USS job sites. The electrical contracting services thus involved a substantial amount of interstate commerce. Because the materials were shipped into the state solely in connection with the contracting jobs, and were otherwise useless, the contracting services were an essential, integral part of interstate commerce.

Moreover, the evidence also serves to prove the interstate element of the Sherman Act by satisfying the affecting commerce theory. Clearly, a large amount of materials used in the contracting jobs traveled through interstate commerce. *Per se* violations in the electrical contracting field involving USS would have a marked effect on interstate commerce, especially by shifting purchases from one contractor to another.

We next consider F&M's argument pertaining to its sentence.

VI.

F&M alleges both that its sentence was illegal and that the judge abused his discretion in imposing sentence. The illegality argument is based on the theory that the one million dollar fine is disproportionate, thus violating the eighth amendment. F&M contends that the judge abused his discretion by basing the fine on the one million dollar penalty accepted by another defendant, the Foley Company, as part of its plea bargain.

F&M relies on *Solem v. Helm*, ___ U.S. ___, (51 U.S.L.W. 5019, June 28, 1983), in arguing that its fine is disproportionate. The Supreme Court suggested three factors for a court to consider in reviewing a sentence for disproportionality: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for the commission of the same crime in other jurisdictions. *Id.* at ___, 51 U.S.L.W. at 5023. Evaluating these factors, we hold that the district court's sentence was not disproportionate and thus not illegal.

F&M brazenly committed a grave crime. The jury found the company guilty of conspiring to commit *per se* violations of the Sherman Act in a series of meetings that obviously were illegal. Moreover, F&M was one of the ringleaders of that conspiracy. As to the sentences imposed in the same jurisdiction, the penalties levied on the other defendants in this case provide a good example. Every individual defendant received a fine and a prison sentence; all the corporate defendants received one million dollar fines. Thus, in comparison, F&M's fine does not appear severe. Moreover, in comparing the sentence with those

received by defendants in other jurisdictions, F&M provided extensive statistics on the infrequency of the imposition of the maximum fine. These statistics, however, illustrate that defendants frequently are fined, and fined in large amounts. Although F&M's one million dollar fine is extensive, its amount was the expression of the Congress, not the judiciary. Accordingly, we hold that the fine is not disproportionate to the gravity of the offense, the public policy considerations implicated and the Congressional determinations.

F&M also contends that the district court abused its discretion by taking another defendant's punishment into account when fining F&M. F&M argues that because the judge gave no reasons for the fine imposed, it is reasonable to believe that he relied on improper motives. This court does not require a judge to elucidate his sentencing rationale.[2] *United States v. Del Piano*, 593 F.2d 539, 540 (3d Cir.) (per curiam), *cert. denied*, 442 U.S. 944 (1979). Nor does F&M offer any evidence, other than the speculations of its excellent lawyers, of the judge's reliance on improper factors in the sentencing process. In short, "aside from characterizing [the fine] as excessive, defendant[] [has] presented no reason which would justify a conclusion that the sentence[] [was] anything other than the result of a proper exercise of judicial judgment." *Government of the Virgin Islands v. Rodriguez*, 423 F.2d 9, 11 (3d Cir. 1970). For the above reasons, we decline to set aside F&M's sentence.

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[2]But *see* Sentencing Reform Act of 1984, Pub. L. No. 98-473, §212(a)(2), 98 Stat. ____, ____ (1984) (to be codified at 18 U.S.C. §3553(c) (effective Nov. 1, 1986) (court will be required to "state in open court the reasons for its imposition of the particular sentence" after the Act's effective date).

VII.

We now consider defendants' remaining arguments in turn.

A.

Lord Electric contends that the district court should not have admitted Govt. Ex. 32, the file of purchase orders and invoices, because the exhibit was irrelevant. Additionally, it argues that even if Govt. Ex. 32 were relevant, the evidence was prejudicial and the trial judge should have excluded the exhibit pursuant to Rule 403, Federal Rules of Evidence. Because the initial relevancy decision implicates the interpretation and application of legal precepts, our review is plenary. *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 269 (3d Cir. 1983); *Universal Minerals, Inc. v. C. A. Hughes & Co.*, 669 F.2d 98, 102-03 (3d Cir. 1981). The rule 403 decision, however, is reviewed under an abuse of discretion standard. *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d at 269-70.

For evidence to be admissible under Rule 402, it must be relevant. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, F.R. Evid. The Government sought to introduce exhibit 32 to prove the interstate commerce element of Sherman Act jurisdiction.

As noted earlier, and contrary to what defendant Lord asserts, the interstate commerce activities of the target of the antitrust violation, as well as the defendant, are relevant to a finding on the interstate commerce element.

Cardio-Medical Associates, 721 F.2d at 74. Because this evidence tended to make the existence of the consequential fact of involvement with interstate commerce more probable than if the evidence were not available, Govt. Ex. 32 was relevant.

Yet even if evidence is relevant, the court may exclude it "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, F.R. Evid. The defendant argues that Govt. Ex. 32 was more prejudicial than probative because the jury could not identify which invoices and freight bills related to the contracts at issue. The jury thus could have believed that evidence of every purchase of materials in interstate commerce contained in the file was relevant to proving the interstate commerce element of the crime.

Contrary to what Lord asserts, the jury could tie interstate purchases to particular contracts, by matching a project number to a job number. Although the process might be time consuming and the correlation not always perfect, this procedure removed the prejudice about which defendant was concerned, and tilted the balance in favor of admissibility.

B.

Sargent Electric argues that it is entitled to a reversal because of allegedly improper remarks made by the prosecutor during his closing argument. In evaluating the prosecutor's comments, our standard of review is "whether such remarks, in the context of the entire trial, were sufficiently prejudicial to violate defendant's due process rights."

United States v. Scarfo, 685 F.2d 842, 849 (3d Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983).

Sargent isolates three instances of misconduct to substantiate its contention. It states that the prosecutor expressed his subjective feelings as to its guilt, yet identifies no page in the transcript where this occurred. The government points to one remark of the prosecutor's: "I submit to you .that the defendants are guilty . . . on the facts and the evidence . . ." App. at 3673a. By tying his remarks to evidence on the record, *United States v. Chartner*, 426 F.2d 470, 477 (3d Cir. 1970), the prosecutor's remarks were not prejudicial.

Likewise, defendant's claims regarding other comments are baseless. The statement by the prosecutor that "[w]hat I would like to do is summarize what I think the issues in the case are . . .," app. at 3610a, was merely a figure of speech, and not an injection of his personal feelings into the trial. The reference to Sargent Electric's financial reports, app. at 3651a, although the reports were not in evidence, was proper rebuttal to the defendant's assertion that it had made a complete financial disclosure to USS. *United States v. Somers*, 496 F.2d 723, 740 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974).

Sargent Electric makes one final related argument for reversal, arguing that the prosecutor's rebuttal was so lengthy—one and a half hours—and non-responsive as to amount to a second closing argument, permitting surrebutal on the part of the defense. The judge had the discretion to limit the prosecutor's rebuttal and chose not to do so. In view of the complicated nature of the case, the rebuttal was not overly long. Considering all the circumstances of the case, neither the rebuttal argument nor the

prosecutor's remarks in any way violated defendant's due process rights.

C.

Defendant Arbogast argues that the trial court should have granted his second request for a continuance because his Montana trial ended shortly before the Pittsburgh trial began. In reviewing the trial court's decision, an appellate court will reverse the lower court only if the judge abused his discretion. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964); *Paullet v. Howard*, 634 F.2d 117, 119 (3d Cir. 1980) (per curiam). The factors a court should consider when presented with a motion for a continuance include: the efficient administration of criminal justice; the accused's rights, including an adequate opportunity to prepare his defense; and the rights of other defendants whose trials are delayed because of the continuance. *United States ex rel. Carey v. Rundle*, 409 F.2d 1210, 1214-15 (3d Cir. 1969), *cert. denied*, 397 U.S. 946 (1970).

In this instance, the trial court did not abuse its discretion. The judge's denial of the second continuance neither abridged Arbogast's right to due process nor was insupportable in light of the circumstances of the case.

Arbogast's reasons for seeking the continuance included giving him more time to prepare his defense and permitting him to be defended by counsel of his choice. Although this case is a fairly complex antitrust suit, Arbogast was aware of the general perimeters of the case against him when the district court first postponed the trial in October. Moreover, Arbogast discussed his defense for the Pittsburgh case with counsel during the Montana trial. Although Arbogast's first choice as counsel did not represent him in Pittsburgh, another lawyer from the same

firm took over the representation. Despite these circumstances, Arbogast had approximately two weeks to devote to his Pittsburgh defense. Courts have found no constitutional violation in appointment of counsel cases when the defendant and his attorney have had much less time to prepare. *Ungar*, 376 U.S. 575 (five days to answer show cause order); *United States ex rel. Chambers v. Maroney*, 408 F.2d 1186 (3d Cir. 1969) (counsel appointed on day of trial).

Additionally, the judge already had continued the trial once, for a period of several months. To have postponed this complicated trial again would not only have contributed to calendar congestion, but, more important, would have made the other defendants involved continue to wait to have their day in court.

D.

Sargent Electric, Lord Electric, Frederic Sargent, and Ralph Vryenhoek argue that the judge erred in giving instructions: (1) by shifting the burden of proof to the defendants by an instruction that price-fixing is *per se* illegal; (2) by failing to charge the jury fully on sham bidding; (3) by his instruction removing the element of intent from the jury's consideration; and (4) by his instruction on the "affecting commerce" theory pertaining to the interstate commerce element of the Sherman Act.

In evaluating the district court's ruling on points for charge, the standard of review is abuse of discretion. *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 199 (3d Cir. 1970). Once the court has given an instruction, we must "determine whether the charge, taken as a whole and viewed in the light of the evidence, fairly and adequately submits the issues in the

case to the jury." *Ayoub v. Spencer*, 550 F.2d 164, 167 (3d Cir.), *cert. denied*, 432 U.S. 907 (1977); *see also United States v. Park*, 421 U.S. 658, 675 (1975). The trial court should be reversed only if the instruction was capable of confusing and thereby misleading the jury. *Idzojtic v. Pennsylvania Railroad Co.*, 431 F.2d 1029, 1036 (3d Cir. 1970) (Aldisert, J., dissenting). We now address defendants' contentions *seriatim*.

The Supreme Court repeatedly has held that *per se* violations require no proof of anticompetitive effect to constitute a violation of the Sherman Act. *Northern Pacific Railway*, 356 U.S. at 5; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-22 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-97 (1927). Consequently, an instruction to this effect would "fairly and adequately" submit the issue to the jury. Moreover, this argument that the instruction creates an irrebuttable presumption has been considered and rejected by several jurisdictions. *See, e.g., United States v. Koppers Co.*, 652 F.2d 290, 293-96 (2d Cir.), *cert. denied*, 454 U.S. 1083 (1981); *United States v. Manufacturers' Association of the Relocatable Building Industry*, 462 F.2d 49, 52 (9th Cir. 1972).

Sargent Electric argues that the court should have given a more complete instruction on sham bidding; it maintains that the instruction should have identified several aspects of USS's bidding procedures as potentially sham bidding and that the sham bidding instruction should have related to the rule of reason, rather than the *per se*, approach. The judge's instructions, however, adequately presented the issue to the jury.

The court initially referred to sham bidding in general terms. The court then instructed the jury that if USS acquiesced in the allocation of contracts, they should find the defendants not guilty. The court thus presented the essence of the sham bidding defense to the jury, although not in terms of specific practices. Moreover, Sargent Electric never requested the court to give the instruction in any particular language. Thus, the court's failure to adopt language other than that which it used is not reversible because the instruction did not represent "plain error resulting in a manifest denial of justice." *United States v. Palmeri*, 630 F.2d 192, 201 (3d Cir. 1980).

Additionally, no reason existed for the judge to couple the sham bidding instruction with a reasonableness instruction. Price-fixing and bid rigging are *per se* violations. Defendant's conduct, even if USS were a monopsonist as defendant contends, did not fall in any "gray zone" requiring a reasonableness instruction. *See United States v. Giller*, 599 F.2d 541 (3d Cir.), *cert. denied*, 444 U.S. 866 (1979). For the reasons stated above, the district court did not err in giving the challenged instruction.

Sargent Electric also alleges that the court's instructions removed consideration of the element of intent from the jury. The court instructed that no showing of specific intent to disobey the law or restrain trade or knowledge of the illegality of the activities was necessary and defendants could be convicted if they knowingly formed the conspiracy or knowingly joined the conspiracy. App. at 3722a. Prior to this, the court also instructed that intent could be proved by showing that the acts of defendants had the effect of bid rigging and the acts were undertaken with knowledge of the bid rigging; or defendants' acts did not have any proscribed effects, but the defendant undertook

those acts with a conscious purpose of bringing about the proscribed effects. *Id.* at 3721a-22a.

The trial court's instructions avoided the problems of presuming intent simply from the commission of certain acts discussed in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) and *Sandstrom v. Montana*, 442 U.S. 510 (1979). Here, the jury was asked to find not only that the defendants knowingly joined or formed the conspiracy, but that they also meant to bring about or did bring about the effects proscribed by the Sherman Act. Moreover, not only did the instructions follow the language accepted by this court, especially as to specific intent, see *United States v. Continental Group, Inc.*, 603 F.2d 444, 462-63 (3d Cir. 1979), but part of the instructions followed the exact language of defendants' proposed instruction No. 14. App. at 3819a. Viewed as a whole, the instructions were a correct statement of the law and fairly and adequately presented this issue to the jury.

Appellants also object to the jury instructions pertaining to the "affecting commerce" theory because the judge stated that the jury need only find that the commerce involved was substantial and that they did not have to find a rise in prices or a shift in commerce and the judge instructed that the government could satisfy either the in commerce or affecting commerce theory to prove the interstate commerce element of the Sherman Act. The court's instructions, however, correctly stated the law. *Per se* violations require no proof of an anti-competitive effect on commerce. *Northern Pacific Railway*, 356 U.S. at 5. Also, evidence that supports either theory pertaining to the interstate commerce element is sufficient to establish a Sherman Act violation. *McLain v. Real Estate Board of New Orleans*, 444 U.S. at 242.

E.

Relying on *United States v. Kelly*, 349 F.2d 720 (2d Cir. 1965), defendant Rodgers alleges prejudice because the district court failed to marshal the evidence against him. A trial court, however, need not marshal the evidence, especially if the trial is complex. *United States v. Gillilan*, 288 F.2d 796, 798-99 (2d Cir. 1961). Unlike *Kelly*, where the evidence did not connect the defendant to the single conspiracy charged, Rodgers suffered no prejudice by a failure to marshal the evidence because that evidence directly connected him to the conspiracy.

VIII.

We have carefully considered all contentions presented by the appellants. The judgment of the district court will be affirmed in all respects.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit

ORDER OF THE COURT OF APPEALS
Amending Its Opinion, December 19, 1984

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 84-3242, 84-3243, 84-3244,
84-3253, 84-3266, 84-3267, and 84-3268

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E.C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Appeal from the United States
District Court for the Western
District of Pennsylvania-Pittsburgh

Argued
October 3, 1984
Before: ALDISERT, *Chief Judge,*
HUNTER and WEIS, *Circuit Judges*
(Filed December 10, 1984)

ORDER AMENDING OPINION

It is hereby ordered that the opinion in the above, filed December 10, 1984, be amended as follows:

Page 10, lines 1 and 2: delete "Lord Electric and Sargent Electric" and substitute "Sargent Electric and Paul Arbogast".

Page 11, line 30: delete "Arbogast" and substitute "Lord Electric".

Page 12, line 1: delete "Arbogast" and substitute "Lord Electric".

Page 12, line 2: change "he" to "it".

Page 12, line 4: delete "Arbogast" and substitute "appellant".

Page 12, line 8: change "his" to "this".

Page 12, line 8: delete "Arbogast" and substitute "Lord Electric".

Page 12, line 12: delete "Arbogast" and substitute "appellant".

Page 12, line 18: delete "The Arbogast" and substitute "Lord Electric's".

Page 12, line 18: change "he" to "it".

Page 12, line 19: change "he" to "it" (twice).

Page 12, line 23: change "his" to "this".

Page 12, line 25: change "he" to "appellant".

Page 12, line 28: delete "Arbogast" and substitute "Lord Electric".

Page 23, line 29: change "he" to "it".

BY THE COURT

/s/ RUGGERO J. ALDISERT
Chief Judge

Dated: December 19, 1984

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit

APPENDIX B

March 2, 1984

Bench Opinion of the District Court Denying Motion for Judgment of Acquittal After the Close of Plaintiff's Case [Official Unreported: Transcribed at pages 3213a and 3214a of the Joint Appendix on Appeal].

With respect to Mr. Rodgers, my answer is still the same on the testimony. I think there is sufficient testimony with respect to Mr. Rodgers for the Government to get this to the jury on that point. I certainly agree with Mr. Gutnick that there is no evidence that Mr. Rodgers was involved in the conspiracy prior to—I think it is December of 1979. But it has been my experience—and I don't know of any cases that say a conspirator can't be a part of a conspiracy for some small space of time, perhaps a moment in time, I don't know; but I don't think that the law says that if the allegation is it went from about '74 to about '81, that a conspirator would not be found guilty of participating in the conspiracy if he was in it for a shorter time. Then, there were certain, as Mr. Gutnick pointed out, conflicts in the testimony before the Court, and he certainly is free to argue that to the jury when the time comes. But, in my opinion, a jury question again has been raised by those conflicts, and the Court would be invading the province of the jury to grant a directed verdict or a verdict of acquittal with respect to that evidence that it has before it.

So those are my conclusions with respect to the motions, and they will be denied for the reasons here stated.

APPENDIX C

Bench Opinion of the District Court Denying Motion for Judgment of Acquittal After Discharge of Jury and Motion for New Trial [Officially Unreported: Transcribed at pages 4262a-4269a].

I am going to deny all of the motions made by the Defendants here. Most of the points raised today were raised during the trial, and I will not expand the record by commenting at length at this time. I will attempt to speak briefly to each one, and I am going to spend a greater amount of time on the argument of Mr. Gutnick in behalf of Mr. Rodgers.

As to the argument that there was either a constructive or attempted actual amendment of the indictment, we do not believe there was a fatal, that is, a prejudicial variance between the allegata and the probata.

The Government did not introduce or attempt to prove bid rigging or allocation of contracts in every contract let by United States Steel in the period covered, as it had indicated it would do at the pretrial argument and, to a lesser degree, in its bill of particulars. However, we are unable to see that this prejudiced any of the Defendants, despite their arguments to the contrary. The greater necessarily included the lesser, and the lesser is what the Government proved.

As to the interstate commerce arguments, we went into them often and at length during the trial, and, if we are in error, we are confident that we will be corrected by the United States Court of Appeals for the Third Circuit.

Regarding the single versus the multiple conspiracy argument, we believe this was presented to the jury as an

issue of fact, and it rendered its decision, we believe, in a way consistent with the evidence.

As to the alleged prejudice to Mr. Arbogast because of the scheduling of the trial within a few weeks of the close of the Montana trial, we note that this indictment was returned in July, 1983, and this trial was scheduled for October, 1983. At the request of all of the Defendants, we deferred to the trial schedule out west and rescheduled this case for February, 1984. Justice must be served in at least a reasonably economic manner, and we fail to see and do not find that Mr. Arbogast was prejudiced by this adhering to the schedule which had been established some four months before the case came to trial.

While we believe that the Government, on occasion, was vigorous in the prosecution of this case, we do not find any action by the Government which amounted to prosecutorial misconduct.

Now, as to some of the points raised by Mr. Gutnick, as to Rule 33, the Court can grant a new trial if it concludes that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted. Such motions should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. U.S. against Kermidas, 332 Fed. Sup. 1312, at 1316, Middle District of Pennsylvania, 1971, affirmed 468 Fed. Sec. 238, Third Circuit, 1972.

With respect to the Rule 29 aspect of Mr. Rodgers' motion, we believe that there was substantial evidence in the light most favorable to the Government to uphold the jury's decision, and this is the balancing test required under Rule 29 by Burks against U.S., 437 U.S. 1 at page 17, 1978.

First, the question of whether the facts indicated one or more distinct conspiracies is normally a matter of fact to be determined by the jury, as I have just mentioned with respect to the other point raised by some of the counsel. Thompson, 621 Fed. Sec. 1147, First Circuit, 1980. The jury determined that the Government had proven it is a single, continuing conspiracy and that the meeting Mr. Rodgers attended was part of the same conspiracy. We agree with Mr. Gutnick that the conspiracy Mr. Rodgers joined had to be the same conspiracy; that is, the conspiracy to allocate a series of jobs through rigged bids over time at U. S. Steel's Western Pennsylvania Works. We agree that one meeting or one agreement does not constitute a continuing agreement. However, the meeting may be one in a series of meetings, evidencing the continuing conspiracy. It is the conspiracy which must be a continuing one, and, while Mr. Rodgers may not have joined until 1979, the one meeting that we are sure of which he attended was located in the same place as all the other meetings, essentially the same people were present, and the subject of discussion was the same; namely, a United States Steel job. The testimony showed that Mr. Rodgers attended the meeting, agreement was reached at the meeting, and Mr. Rodgers was not merely present, he participated in the discussion, demanding a job for Foley. We think there was substantial evidence from which the jury could find that the meeting attended by Mr. Rodgers was part of the same continuing conspiracy charged in the indictment to rig bids and allocate contracts, and that Mr. Rodgers' attendance and participation in this meeting constituted his joining the conspiracy.

In U.S. against Falcone, Judge Learned Hand placed a touchstone to mark the fundamental quality of the co-

conspirator. He said: "He must in some sense promote their venture himself, make it his own, have a stake in its outcome." 109 Fed. Sec. at 581. Partnership in the profits of the criminal venture is not essential, but the defendant must at least have demonstrated an intent to further, promote, and cooperate in the illegal activity. Direct Sales versus United States, 1943, 319 U.S. 703, 711.

Even though Mr. Rodgers did not ask to become part of the group or ask to be included in any or all of the meetings in the future or ask to be able to call meetings and initiate rigging over the phone or ask to get a share of future jobs, the testimony of the various witnesses, we believe, was sufficient and substantial evidence as to Mr. Rodgers' participation in the meeting and that he was a party to the agreement reached. The subject of that agreement was the same as that of the other conspiratorial meetings, the allocation of work at the United States Steel Pennsylvania Works.

While a conspiracy is seldom born of "open covenants openly arrived at," Lacaze versus United States, Fifth Circuit, 1968, 391 Fed. Sec. 516, 520, there must be proof of a common purpose and plan to prove that a defendant has joined in a conspiracy. United States against James, Fifth Circuit, 1976, 528 Fed. Sec. 999, at 1010 and 1011, cert. denied 429 U.S. 959. It is not necessary to prove that the defendant knew either the entire scope or all the details of the scheme; it need be shown only that he knew its essential nature. It is essential, nonetheless, that the prosecution show beyond reasonable doubt that the defendant had the deliberate, knowing, specific intent to join the conspiracy. This must be shown by substantial evidence, including

evidence of some sort of agreement, an agreement understood by the defendant, to which he was a party and to which he meant to be a party.

The jury found the meeting attended by Mr. Rodgers to be part of the same continuing conspiracy. We believe there was substantial evidence from the testimony of Mr. Therrien alone that Mr. Rodgers went to the meeting with the intent to participate in the decision to allocate contracts by asking the group for work, by discussing the work, and by being part of the group which decided to allocate the contract. There was substantial evidence from which the jury could conclude that he was a conspirator, that he had adopted and joined in the scheme, even if it was conceived by others. We think irrelevant the fact that no one apprised Rodgers of the history of the conspiracy, its continuing nature. Mr. Rodgers, from the testimony, clearly knew the purpose of the meeting, and it was clearly not the first time the other participants had met.

Mr. Gutnick has referred the Court to the case of the United States against Continental Group, 603 Fed. Sec. 444, Third Circuit, 1979, for the proposition that attendance at one meeting is not enough to prove participation in a conspiracy. Continental involved the 26-year conspiracy to fix prices on consumer bags. Chase Bag, a defendant, became a participant late in the conspiracy. Its representatives were present at a meeting where St. Regis, a manufacturer, announced its intention to formulate a new price list for pet food bags. Harley, another co-conspirator, stated at the meeting that he would follow the St. Regis prices. His testimony was that, after the meeting, he discussed the St. Regis proposal with Rue, a Chase Bag representative, and that Rue told Harley that Chase Bag would follow it, too. Chase's prices were later in accord with St. Regis'. Chase

Bag argued that the agreement with Harley and participation in other meetings where prices were discussed, and parallel pricing policies, were not sufficient to prove that it joined a continuing 26-year conspiracy. The Court stated:

> "Had the St. Regis incident been the only evidence against Chase Bag, we might agree that the Government's proof varied substantially from the indictment. We note, however, that Chase Bag's participation in various meetings where prices were discussed, its exchange of price information with competitors, and its parallel pricing policies, although perhaps innocent by themselves, are cast in a different light by Rue's apparent agreement with Harley to fix prices.
>
> "Confronted with this evidence of express agreement, we believe the jury was entitled to infer that Chase Bag's participation in other conspiratorial activities was not wholly innocent and that it knowingly joined the conspiracy."

We believe that Continental addressed the question of whether attendance at a meeting, where no representatives of Chase Bag said anything, in conjunction with a post-meeting statement of the Chase representative to one of the other conspirators, amounted to joining a 26-year conspiracy. Alone, the Court indicated this might not be enough. That is, the conspiracy might have been between Chase and Harley. However, we find the facts of this case different. Mr. Rodgers did not sit quietly at the meeting and make a statement to one of those present after the meeting. He spoke at the meeting, asking for the other conspirators to allot him a job. He was an active participant in the meeting, and, as a result of the meeting, an agreement was reached. While attendance at a meeting and

a statement made to one conspirator after the meeting, as in Continental, may not be substantial enough to show that Chase joined a 26-year conspiracy, we believe that the testimony recounting Mr. Rodgers' attendance and participation at the meeting, the purpose of which was the same as many others, namely, to allocate U. S. Steel jobs, was direct and substantial evidence that he joined the same conspiracy, sufficient to uphold the jury's decision.

So those are the reasons with respect to our denial of Mr. Rodgers' motion.

APPENDIX D

JUDGMENT OF THE COURT OF APPEALS,
December 10, 1984

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 84-3242, 84-3243, 84-3244,
84-3253, 84-3266, 84-3267 and 84-3268

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E. C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Appellant in No. 84-3266

JOSEPH J. RODGERS

(D.C. Crim No. 83-0098-07)

Appeal from the United States District Court for the Western District of Pennsylvania-Pittsburgh

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Present: ALDISERT, *Chief Judge,*
HUNTER and WEIS, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel October 3, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered April 19, 1983, in W.D. Pa. Crim. Nos. 83-98-08, 83-98-09 and 83-98-10, and entered April 20, 1983 in W.D. Pa. Crim. Nos. 83-98-04, 83-98-07, 83-98-03, and 83-98-01, appealed here respectively at Nos. 84-3253, 84-3243, 84-3244, 84-3242, 84-3266, 84-3267 and 84-3268 be, and the same are hereby affirmed. All the above in accordance with the opinion of this Court.

ATTEST

/s/ SALLY MRVOS
Clerk

Dated: December 10, 1984

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

United States of America

v.

JOSEPH J. RODGERS

Docket No. CRIMINAL NO. 83-98

JUDGMENT AND PROBATION/ COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date: 4/19/84.

Counsel: With Counsel—Yale Gutnick, Esq.

Plea: Not Guilty. (Ct Rep T. Thomas)

There being a verdict of Guilty. Defendant has been convicted as charged of the offense(s) of:

COUNT I: Combining and conspiring in unreasonable restraint of interstate trade and commerce (15 U.S.C. §1).

Sentence or Probation Order: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) years. Imposition of sentence as to imprisonment only is suspended and defendant is placed on probation for a period of Four (4) years, on the following terms and conditions:

1. That defendant comply with all local, state and federal laws.

2. That defendant comply with rules and regulations of the probation department.

It is further ordered that:

1. That the defendant pay a fine to the United States in the sum of $10,000.00 to be paid in such installments as shall be set by the Probation Office.

2. That the defendant is ordered to pay 1/7 of the costs of prosecution on or before May 21, 1984.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

/s/ MAURICE B. COHILL, JR.

DATE: 4/19/84

APPENDIX F

DENIAL OF PETITION FOR REHEARING
by the Court of Appeals

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 84-3266

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E. C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Appellant in No. 84-3266

JOSEPH J. RODGERS

(D.C. Crim No. 83-0098-07)

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, and SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT

/s/ ALDISERT
Chief Judge

Jan. 14, 1985

APPENDIX G

ORDER OF THE COURT OF APPEALS
Staying the Court's Mandate

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 84-3266

THE UNITED STATES

v.

FISCHBACH AND MOORE., et al.,

Joseph J. Rodgers, *Appellant*

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above case be, and it is hereby stayed until February 20, 1985.

/s/ RUGGERO J. ALDISERT
Chief Judge

DATED: January 30, 1985